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Lire *Adab* comme *Fiqh* : Les filles chantantes d'al-Ǧaḥiẓ et les limites du raisonnement juridique (*Qiyās*) [1]

Lire l' Adab comme du Fiqh : l'épître d'al-āḥiẓ sur les esclaves-chanteuses et les limites du qiyās

قراءة الأدب كفقه: رسالة الجاحظ في القيان وحدود القياس

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Les résumés

English Français العربية
L'épître d'Al-Alāḥiẓ sur les chanteuses (*Risāla fī al-qiyān*) peut être lue à la lumière des premières polémiques abbassides concernant l'interprétation de la loi islamique. Nous étudierons la relation d'al-Gˇāḥiẓ avec des experts juridiques tels que al-Šāfiʿī, et le rôle joué par les débats juridiques et herméneutiques dans la structure de l'épître de al-Gˇāḥiẓ, en discutant des notions de *istihsan* et *qiyas* , et la dichotomie entre *'amal* et *niyya* . Cette analyse nous permettra d'esquisser le discours sur le droit qui sous-tend la *Risāla fī al qiyān* et de proposer une explication possible de sa relation avec le discours sur les passions.

Il est possible de lire l'épître d'al-āḥiẓ sur les esclaves chanteuses (*Risāla fī al-qiyān*) à la lumière de la polémique sur l'interprétation de la loi musulmane au début de la période abbasside. Dans cet article sont étudiés la relation d'al-āḥiẓ avec les experts juridiques tels qu'al-Šāfiʿī et le rôle joué par les débats juridiques et herméneutiques dans la structure de l'épître d'al-āḥiẓ, en discutant les notions d ' *istiḥsān* et de *qiyās* , et la dichotomie *ʿamal / niyya* . La mise en relief du discours sur la loi qui tend-tend la *Risāla al-qiyā* permet d'avancer une explication possible de sa relation avec le discours sur les passions.

قد نقرأ رسالة الجاحظ في القيان في ضوء الجدل حول تفسير الشريعة في أوائل العصر العباسي. فسنقوم بدراسة العلاقة بين الجاحظ وبين الشافعي وغيره من الفقهاء, وتبيين الدور الذي لعبته المجادلات الفقهية في بنية رسالة الجاحظ من خلال مناقشة مفهومي الاستحسان والقياس والانقسام بين العمل والنية. فيمكننا هذا التحليل من فهم الحدث عن الفقه الكامن في الرسالة ومن تفسير محتملعلاقته مع الحديث عن العشق.

Termes d'indexation

Mots clés : adab , al-Jahiz , charia , droit musulman , fiqh , islam
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Texte intégral

1 Au cours des dernières années, d'importantes contributions à l'étude d'al-aḥi visaient à lire ses œuvres sous un jour nouveau et à réviser l'image stéréotypée de l'auteur comme un *adepte* mercuriel désireux de *plaire* à ses nombreux patrons. Cette caractérisation simpliste du «génie littéraire» d'al-Gˇāḥiẓ, associée à une emphase biographique trompeuse sur l'analyse de ses œuvres, a provoqué le phénomène érudit que James Montgomery a *appelé le Buḫalaism* , une approche qui dissout les bizarreries apparentes des œuvres d'al-Gˇāḥi dans le monde. conventions familières de ses prétendus traités humoristiques, tels que le *Kitāb al-Buḫalāʾ*. À la suite de ces idées fausses, la réputation d'al-Gˇāḥiẓ en tant que témoin fiable et agent actif des polémiques politico-religieuses de la période du début d'ʿAbbāsid a porté le stigmate de son inconstance et nombre de ses traités n'ont pas reçu l'attention qu'ils méritaient [2] . Cet article, inspiré par le même esprit révisionniste, vise à contribuer à cette nouvelle lecture de l'héritage āḥiẓian en mettant l'accent sur les complexités de l'une de ses œuvres les plus célèbres, l' *Épître sur les filles chantantes* (*Risāla fī al-qiyān*). Concrètement, je me pencherai sur l'un des aspects de ce travail qui, à mon avis, a été particulièrement négligé par les spécialistes: le recours par al-Gˇāḥiẓ à des arguments juridiques.

2 À cet égard, cet article est une expérience de lecture conjointe des traités de *fiqh* et d' *adab* et une tentative de démonstration de la connaissance par al-Gˇāḥiẓ de l'herméneutique légale. La *Risāla fī al-Qiyān d'Al-Gˇāḥiẓ* a traditionnellement été interprétée comme une réflexion sur l'amour et la passion, en particulier après l'article influent de Cheikh-Moussa «La négation d'Éros», que je vais largement utiliser [3] . Je soutiendrai que, en plus de ce discours fondé sur la dichotomie *Hubb* / *'išq*, il existe une deuxième ligne de discussion qui aborde une polémique savante concernant les limites de la prohibition légale et l'interprétation des sources révélées, et que ce contexte juridique est nécessaire pour une bonne compréhension de la *Risāla fī al-qiyān* .

3 L'image d'al-Gˇāḥiẓ en tant qu'érudit versé dans les principes du droit ne correspond certainement pas à la description de l'auteur que l'on trouve dans les sources - et encore moins dans la littérature secondaire - et nécessite des explications supplémentaires. En fait, le peu que nous savons de la relation entre al-āḥiẓ et les juristes musulmans de son temps et de sa connaissance des principes du droit donne une image très négative. Déjà au troisième / neuvième siècle, Ibn Qutayba, un des étudiants d'al-Gˇāḥiẓ, a mis le premier clou dans le cercueil où la crédibilité de son ancien professeur serait enterrée. Ibn al-Qutayba accusé Gˇāḥiẓ d'être inconstante, capable de défendre des opinions contradictoires, de l' utilisation de faux *Hadits* et, pire encore, de forger les [4] . Cette opinion, alliée aux références muʿtazilites d'al-Gˇāḥiẓ, à son implication personnelle dans la *Miḥna* et aux traités vitrioliques qu'il a écrits contre les membres du *milieu* traditionniste à qui il a qualifié avec mépris d' *ašwiyya* et *Nābita* , lui a valu la gloire dont il a toujours bénéficié. depuis, celui d' *adulte* raffiné qui méprisait les érudits religieux, de théologien précieux mais anarchique, et de *flagellum hereticorum* à sa manière, qui a été déterminé par sa défense de la cause muʿtazilite [5] .

4 We would not find many traces of al-Gˇāḥiẓ's interest in *fiqh* if we paid attention to the inventory of his works. Out of the almost 300 titles collected by Charles Pellat, only one refers directly to a legal topic, the *Kitāb fī ḫabar al-wāḥid* mentioned by al-Bāqillānī[6]. This work, if it ever existed, has not survived. The reference is also a single report in itself; we do not have any other reference to this treatise, but al-Bāqillānī knew what he was talking about: this work is mentioned, together with al-Gˇāḥiẓ's *Naẓm al-Qurʾān* and *al-Radd ʿalā al-Naṣārā*, as one of the works where the author discussed the concept of *ḫabar*.

5 The treatment of *aḫbār* is also the main topic of another treatise of al-Gˇāḥiẓ, the *Kitāb al-aḫbār wa-kayfa taṣiḥḥu*, where al-Gˇāḥiẓ reports the opinions of al-Naẓẓām concerning *ḥadīṯ*[7]. The information provided by this text does not offer any particular insight into al-Gˇāḥiẓ's attitude towards the religious scholars and legal theory, but there are other works that, despite not being exclusively devoted to legal topics, show clearly that al-Gˇāḥiẓ was not only familiar with the legal polemics of his time, but also with the hermeneutical principles invoked in these debates.

6 Of course, al-Gˇāḥiẓ's interests were not reduced to the *aḫbār*. James Montgomery was the first to draw attention to the clear parallelisms between al-Gˇāḥiẓ's definition of *bayān* and that made by al-Šāfiʿī in his *Risāla*[8]. For Montgomery, this discussion may have been part of a

polemical engagement with al-Šāfiʿī's treatment of this subject, an engagement that has been also recognised by Joseph Lowry in his study of al-Šāfiʿī's *Risāla*[9].

7 The relation between al-Ǧāḥiẓ and al-Šāfiʿī goes beyond the particular polemic concerning the definition of *bayān*. Although I am aware of but a single direct reference to al-Šāfiʿī in the works of al-Ǧāḥiẓ[10], al-Šāfiʿī is a constant presence in his treatises and al-Ǧāḥiẓ's analysis of the religious sources, especially in his works on the imamate, is based on Šāfiʿite hermeneutics[11]. The *Risāla fī al-qiyān* provides a good example of this relation and, in general, of al-Ǧāḥiẓ's knowledge of the legal polemics of his time. As I will argue, this epistle not only addreses real legal debates but also, legal polemics governing the underlying logic of this treatise and structure the entire text.

Dramatis personae and structure of the epistle

8 Like the rest of al-Ǧāḥiẓ's treatises, the *Risāla fī al-qiyān* is a polyphonic text of extraordinary complexity where several dialogic structures levels interact at varied levels. There are four interlocutors; three of them correspond to the different voices that speak in the epistle, as Cheikh-Moussa has shown, and the fourth are the addresses of the epistle, who do not speak but whose arguments are exposed and refuted:[12]

1. The ʿAbbāsid notables who defend their right to enjoy the pleasures provided by singing-girls and whose names are given in the opening paragraph. As Cheikh-Moussa has demonstrated, they were notable members of the ʿAbbāsid court and their voice corresponds to the first person plural in §1-32.[13]
2. Those who criticised the practice of frequenting the company of singing girls, who are referred to as Ḥašwiyya, a pejorative term usually used by al-Ǧāḥiẓ to refer to the most ignorant members of the Traditionist milieu. They are the addresses of the epistle.
3. Al-Ǧāḥiẓ, whose voice would correspond to the first person singular in §33-35, and, occasionally, also in other parts of the epistle.
4. The merchants of singing girls (*muqayyinūn*), who defend both the lawfulness of trading with slave-girls and the dilatory ruses they employ to excite the passion of their clients, increase the frequency of their visits and obtain more benefits; their voice would correspond to the first person plural in §38-54.

9 Both Pellat and Beeston, whose reading of al-Ǧāḥiẓ's epistles is often conditioned by the digressive style of this author, have considered the *Risāla fī al-qiyān* a highly disorganised work; after all, anecdotes were al-Ǧāḥiẓ's bread and butter and his innate curiosity prevented him from following a systematic method[14]. Of course, this is but one more of the "Buḫalaist" stereotypes about this author that should be rejected. Beyond the welter of confusing voices there are two clear argumentative lines that structure the epistle:

1. Discourse on law: the discussion between the purported authors of the epistle and their critics, the Ḥašwiyya, is centred on the discussion of the limits of the prohibitions contained in the revealed sources and the dichotomy *ḥarām/ḥalāl*. The defence of the lawfulness of their trade made by the *muqayyinūn* addresses similar critiques and is centred on the legal distinction between intention (*niyya*) and act (*ʿamal*), and evidence (*ẓāhir*) and suspicion (*šubha*).
2. Discourse on love and passion: this discourse has been read as an exposition of al-Ǧāḥiẓ's ethical ideas to condemn the practice defended by the authors of the epistle.

10 Cheikh-Moussa has cogently argued that al-Ǧāḥiẓ's treatment of the *qiyān* is predicated upon a solid theory of human passions and has demonstrated how al-Ǧāḥiẓ's treatment of the dichotomy *ḥubb/ʿišq* articulates part of the arguments developed in this epistle. For Cheikh-Moussa, the purpose of this work is to elevate the discourse on human passions to the ethical level, overcoming the sophistry of the legal disquisitions that emerges here and there throughout the treatise. For him, the legal principles adduced in this text are indisputable for the Muslims and, despite the efforts of the defenders of the relations with the *qiyān* to disguise their arguments behind decontextualised Qurʾānic quotations, the *šarīʿa* clearly states that these practices are unlawful[15]. The references to legal arguments should be interpreted, therefore, as satirical allusions that provoke the opposite effect to the one intended. The main purpose of al-Ǧāḥiẓ in this *risāla* is to define the ethical boundaries that the members of the *ḫāṣṣa* should respect; consequently, the logic that underlines his treatment of the polemics concerning the *qiyān* should be found in al-Ǧāḥiẓ's ethical theories.

11 It is beyond doubt that the discourse on human passions constitutes one of the axis of this epistle. I do not consider, however, that legal considerations play any less a part. On the contrary, al-Ǧāḥiẓ's epistle is also structured upon clear juridical argumentations and the legal issues prompted in this text were by no means undisputed, indeed, they refer to important polemics addressed by al-Ǧāḥiẓ in other works.

The discourse on law in the *Risāla fī al-Qiyān*

12 If we consider the legal justifications adduced against the contention that socializing with singing girls and participating in their trade is unlawful, we can indentify a clear and coherent narrative line in the epistle that goes from the general to the particular: in the first part of the treatise, the discussion is focused on the lawfulness of the practice of seeing the faces of women, talking with them and enjoying their company; in the second part, the debate moves on to the slaves and hovers over proxenetism and sexual intercourse with singing-girls, often disguised as a commercial transaction.

13 The preamble introduces the two main intellectual interlocutors of the treatise: the purported authors of the epistle and their adversaries, later on referred to as Ḥašwiyya[16]. The object of the polemic is also clearly stated: the authors hold that enjoying the company of singing slaves and participating in their trade does not contravene any law and they have decided to write this epistle so that their silence would not be interpreted as a tacit admission of the arguments of their critics.

14 The first argumentative line is essentially devoted to refuting the claims of those who hold that looking at women and engaging in conversation with them is unlawful. The defence of this practice begins with a discussion of the natural causes explaining the mutual need of men and women that includes several references to Qurʾānic verses: the Earth is for man "a chattel and 'a usufruct for a time'" (Q. 2:36); "the woman 'was created so that [the man] could find solace in her'" (Q. 7:189, 30:21)[17]; and "women are tillage ground for men" (Q. 2:223)[18]. The alleged authors of the *risāla* argue that men could have freely used women, as these verses imply, were it not that God had imposed over them the obligation (*farḍ*) of prohibiting that which is illicit and allowing that which is licit (*taḥrīm mā ḥarrama wa-taḥlīl mā aḥalla Allāh*) so that there would not be doubts concerning paternity and the assignation of inheritances[19]. The object of the discussion conveyed in the first part of the epistle [§§7-27] is, precisely, to determine what should and should not be prohibited concerning the relationship of men and women.

15 The premise adduced to discuss this point may be read in terms of legal theory:

> "Everything that we do not find that the Book of God Almighty and the *sunna* of the Messenger of God -peace be upon him- have rendered unlawful (*maḥram*) is legally indifferent (*mubāḥ*) and unqualified (*muṭlaq*); people deeming something good (*istiḥsān*) or bad (*istiqbāḥ*) do not provide any basis for legal reasoning (*qiyās*) as long as we do not infer from the proscriptions (*taḥrīm*) [in the Qurʾān and the *sunna*] a sign (*dalīl*) about something being good (*ḥusni-hi*) and an indication of its lawfulness (*ḥalāli-hi*). We do not know any rationale (*waǧh*) for jealousy concerning other's [gaining access to women] than those who are prohibited (*ḥarām*); were it not because of the existence of the prohibition [regarding the *maḥārim*], jealousy would have disappeared and it would have been incumbent upon us [to apply] legal reasoning (*qiyās*) about who is more entitled to a woman, [otherwise] someone would say: 'no one is more adequate for them than another, as they are like nosegays or apples that people exchange at one another'. That is why the man who would have had many women contents himself with one and shares the rest among his associates: when the legal obligation (*farīḍa*) of differentiating between the lawful and the unlawful (*al-ḥalāl wa-l-ḥarām*) was established, then the Muslims contented themselves with the limit established for them and gave the man permission to do that which they authorise for him."[20]

16 This passage is extremely complicated and presents serious textual problems. I interpret this argumentation as follows: all prohibitions should derive from the revealed sources, Qurʾān and *sunna*; if the revelation is silent concerning a particular issue this should be considered permitted, unless it is indifferent and unqualified. In order to ethically evaluate acts not directly addressed by the Qurʾān and the *suna*, and consider something good or bad, the reasoning should be based on the signs (*dalāʾil*) provided by the legal prohibitions explicitly considered in the revealed sources, but it is not legitimate to infer legal rules form the opinion of the people about what should be considered good or bad (*istiḥsān*).

17 It is worth noting that the emphasis falls on the limits of the prohibition rather than on the possibilities of extending it to other cases by applying legal reasoning. In this regard, the condemnation of *istiḥsān* follows an extremely reductionist approach to the sources of law and is intended to limit the scope of the laws that forbid relations with women exclusively to the *maḥārim*, as we can see in the several examples provided to illustrate this point in the Ǧāhiliyya as well as in Islam.

18 The famous couples of pre-Islamic *ʿuḏrī* lovers are mentioned to demonstrate that looking at women and talking with them (*al-naẓar wa-l-muḥādaṯa*) was permitted in the *Ǧāhiliyya*[21], and that Muḥammad forbade this practice exclusively (*ḫaṣṣatan*) when it involved married women, who should wear veil. With this particular exception, the Prophet did not abrogate this practice and it was not declared *ḥarām* in Islam[22]. The custom of performing the circumambulation unveiled is also adduced as an example, together with the story of Ḍubāʿa bint ʿĀmir, who performed

the *ṭawāf* naked, and brought about this tradition. Other examples are taken from episodes of the history of Islam, such as the caliph ʿUmar, who, despite being known for his jealousy and his piety, allowed ʿAlī to see his wife unveiled and did not prohibit this.[23]

19 According to the alleged authors of the *risāla*, there is nothing against this practice in the religious sources except the specific laws concerning the wives. Respectable figures of Islam with great expertise in law such as ʿUmar, ʿAlī, or al-Šaʿbī, would have prohibited this practice if they had known any prophetic tradition condemning this. Analogy is also adduced to support this claim: if looking at middle-aged women is not prohibited, it should not be considered prohibited when the women are young[24]. As in the aforementioned paragraph rejecting *istiḥsān*, the reasoning is extremely restrictive: in absence of any explicit prohibition, this issue is legally indifferent and only narrow-minded people overstep the limits of jealousy (*ḥadd al-ġayra*) —which should be limited to one's wives—, and consider the prohibition of looking at women as an obligation and duty (*ka-l-ḥāqq al-wāǧib*)[25]. Taking jealousy beyond the limits of that which God has declared *ḥarām* is not only futile (*bāṭil*), but proper to frail minds like those of women.[26]

The defence of the singing-girls

20 At this point, the argumentation abandons the general discourse on women and focuses particularly on the slave-girls[27]. The first point treated is the possession of slave girls and their appearance in public. Caliphs and noble men provide a good example of the lawfulness of owning slave-girls and enjoying their company in the presence of other men: Muʿāwiya used to have slave-girls and show them in public[28], and caliphs and important people used to employ slave-girls as personal servants who accompanied them in their public appearances[29], without anybody raising any objection.[30]

21 Having proved that owning slave-girls is licit, the discussion moves on to a particular group of them, the *qiyān,* and their specific skills. The first to be discussed is singing. There is nothing reproachful in singing, as it is based on poetry and music. Poetry is not good or bad *per se*, as ʿUmar b. al-Ḫaṭṭāb said: poetry is a kind of speech that should be judged according to its content, and the addition of melody does not contravene any prohibition.[31] A prophetic *ḥadīṯ* stating that "Some poetry is true wisdom" (*inna min al-šiʿr ḥikma*) is also quoted to defend the lawfulness of poetry. As in the discussion concerning jealousy, the conclusion is that there is no legal basis in the Qurʾān and the *sunna* to consider singing or singers unlawful.

22 Several examples of famous figures of Islam who enjoyed music are mentioned in support of its licitness. The list is striking, to say the least: the first example is certainly a pious Muslim, ʿAbd Allāh b. Ǧaʿfar al-Ṭayyār, who is said to have owned slave girls who sang and also a singing boy[32]; the pious ʿUmar b. ʿAbd al-ʿAzīz is also mentioned, as he used to be a singer before coming to the caliphal throne; the remaining examples, however, are Umayyad caliphs who did not enter into history as models of virtue: Yazīd b. Muʿāwiya, who used to listen to music; Yazīd b. ʿAbd al-Malik, owner of a famous and virtuous *qayna* named Sallāma; and Walīd b. Yazīd, who was known by his love poetry. Cheikh-Moussa has noted the paradox of using these examples to defend the lawfulness of singing, when these caliphs are presented in the historical chronicles as epigones of the moral laxity and the dissolute life of the Umayyads.[33]

23 For Cheikh-Moussa these passages are an ironic reference to the faulty argumentation of those who defend the lawfulness of singing: the doubtful moral authority of the figures used to support their claim would be incompatible with the rightful position they intend to defend, and the reference to the ominous Umayyad caliphs would achieve the contrary effect and undermine their arguments. However, the Umayyad caliphs were not universally regarded as impious in time of al-Ǧāḥiẓ; in fact, they enjoyed great acceptance among certain groups of the urban milieu associated to the *ahl al-ḥadīṯ*, to the extent that some of them excluded ʿAlī from the *a'immat al-hudā* and included Muʿāwiya and his son Yazīd among them.[34] Ibn Qutayba mentions them when criticizing the extremism of some *muḥaddiṯūn* who, in their zeal to refute the Muʿtazilite theses on the createdness of the *Qurʾān*, went as far as to adopt anthropomorphist ideas (*tašbīh*). The *Risāla fī al-nābita* of al-Ǧāḥiẓ is another example of this association of the traditionist milieu both with the Umayyads and anthropomorphism. It would be possible, then, to see in these references to the Umayyads a way of pointing out not only the contradictions of the defenders of the singing-girls, but rather those who held them as role-model, the Ḥašwiyya, who certainly were related to the pro-Umayyad Traditionists and had been the target of al-Ǧāḥiẓ's darts in numerous occasions, among other things because of their extreme religious scrupulosity (*warʿa*)[35]. It is pertinent to take this possibility into consideration, not only because *warʿa* was behind the movements that, invoking the doctrine of *al-amr bi-l-maʿrūf*, condemned music[36]; but especially because it was based on similar legal principles to those adduced in defence of the *qiyān*: whereas for the authors of the *risāla* everything not explicitly forbidden in the Qurʾān and the *sunna* is legally indifferent and, therefore, licit; for the *Ḥašwiyya*, anything not expressly sanctioned by the religious sources is suspicious of being *ḥarām* and, consequently, should be avoided.[37]

24 The defence of singing reported in this *risāla* could very well be an allusion to these polemics, and the striking mention of the Umayyad caliphs be explained with this interpretation. However, the defence of the singing girls goes further and the line between *ḥarām* and *ḥalāl* becomes more blurred: it is no longer the practice of looking at free women and talking with them, or the pleasure of enjoying their company and their music, which needs to be justified: the next step in this particular *tour de force* is the description of the arts of coquetry in which the singing girls excelled and the discussion of the sexual relations to which this often led.

25 The first explicit reference to sexual relations with the slaves seems to pose another conundrum: it is an anecdote about al-Ma'mūn that does not present him in a very positive light. According to the authors, al-Ma'mūn was infatuated with one of his wife's slaves, whom his wife set free so that the caliph could marry her, giving her a dowry of ten thousand dirhams. Right after the consummation of the marriage, al-Ma'mūn let her go and paid her the money.[38] If anything, this example seems to justify temporary marriage. Similar strategies are ascribed to the slaves who beguile their clients into marrying then to calm a passion that expires the very moment it is consummated[39], and the *muqayyinūn* to whom al-Ǧāḥiẓ gives voice at the end of the epistle openly admit that *mutʿa* was the hidden intention behind the visits of many of their clients.[40]

26 Cheikh-Moussa argues that the association of al-Ma'mūn with the owners of slave-girls and the authors that sign the epistle cannot be understood but as a satire, as it would have been highly improbable that al-Ǧāḥiẓ would have assimilated the practices of the admired ʿAbbāsid caliph to those of the lovers of singing-girls. We cannot exclude the possibility that this reference, like those of the Umayyads, may have conveyed an ironic meaning. However, the reference to al-Ma'mūn can also be considered pertinent and logical for two main reasons: on the one hand, the presumed authors of the letter were attached to court figures who represented the cultural and legal heritage of al-Ma'mūn; on the other hand, several sources include, among the polemical measures adopted by al-Ma'mūn, the acceptance of temporary marriage (*mutʿa*).[41]

27 Al-Ǧāḥiẓ himself dealt with this issue in one of his works. The extant fragments of the *Kitāb al-ʿabbāsiyya* discuss the unlawfulness of two polemical measures taken by the first two caliphs: Abū Bakr's rejection of Fāṭima's claims over the inheritance of Muḥammad, concretely the estates of Fadak and Ḫaybar; and ʿUmar's prohibition of the two modalities of temporary marriage, the *tamattuʿ* on the pilgrimage and the *mutʿat al-nisā'*.[42] Al-Ǧāḥiẓ's treatise relates the opinions of those who refuted the decisions of Abū Bakr and ʿUmar on the basis of the principles governing the abrogation of Qurʾānic verses, wrongly applied by both caliphs; for them, the revocation of these decisions was correct. Although no mention is made of al-Ma'mūn in the few passages that have survived from this treatise, we know that al-Ma'mūn revoked both measures and the most plausible interpretation of these fragments is that they may have been part of a polemic concerning the controversial religious policies of this caliph.[43]

28 The prosopographical study carried out by Naǧm and Cheikh-Moussa allows us to situate the alleged authors of the *Risāla fī al-qiyān* in the human cartography of the early ʿAbbāsid period[44]. All the figures mentioned in the introduction belonged to the circles of the ʿAbbāsid court, and almost all of them seem to have been related to one of al-Ǧāḥiẓ's patrons, Muḥammad b. ʿAbd al-Malik Ibn al-Zayyāt. Ibn al-Zayyāt was vizier for al-Muʿtaṣim and al-Wāṯiq during the *Miḥna* period, between 221/833 and 233/847, until he fell into disgrace with al-Mutawakkil, who ordered his imprisonment, torture and execution.

29 The opposition between the members of the court and the urban *'ulamā'* during this period has been thoroughly studied. Al-Ma'mūn's religious policies and their continuation until the caliphate of al-Mutawakkil have been interpreted either as an attempt to restore for the caliphate the religious authority once associated to the person of the caliph, in opposition to the claims of the increasingly influential urban religious scholars;[45] or as an authoritarian hiatus in the traditional cooperation of caliphs and scholars.[46] In any case, the clash between the courtly elites, among whom the authors of the *Risāla fī al-qiyān* should be included, and sectors of the urban milieu that became the seed-bed of the addressees of the epistle, the Ḥašwiyya, provide a plausible context to interpret this text and could explain the use of al-Ma'mūn as an intellectual reference for this particular interpretation of the law.

30 Does it mean that the defence of sexual intercourse with singing girls is related to al-Maʾmūn's revocation of the prohibition of *mutʿa*? Even if the arranged marriage of the slave of al-Ma ʾmūn's wife could be interpreted as a different modality of union, the anecdote about al-Ma ʾmūn's ephemeral marriage is not innocent at all and the audience of this *risāla* would have perceived a clear allusion to the caliph's position with regard to *mutʿa*; furthermore, the final speech of the *muqayyinūn* explicitly refers to temporary marriage as a non-recognised but obvious method of having sexual relations with the *qiyān*.[47] I do not think, however, that the entire debate could be reduced to this simplistic dichotomy opposing the antagonistic discourses of the court elites and the urban *ʿulamā'*.

The *qiyān* and the limits of legal interpretation

31 The polemic that the *Risāla fī al-qiyān* addresses is more sophisticated than that and echoes legal discussions that, already in time of al-Ǧāḥiẓ, occupied the minds of important jurists. It is true that the epistle has an overall satirical tone, but satire is only possible because the interlocutors

base their arguments on a shared paradigm, which is applied to discuss the lawfulness of all the practices considered in this epistle: looking at women and talking with them, owning slaves and displaying them in presence of other men, admiring the musical arts of the singing-girls and, eventually, enjoying their amatory skills.

32 The arguments conveyed by al-Ǧāḥiẓ are part of a scholarly polemic, an internal debate among jurists for which, despite the scarcity of legal sources from the ninth century, it is possible to find some evidence. The main topic of this *risāla*, at least in terms of *fiqh*, is the definition of the limits of legal prohibition. As we have seen, it was formulated in a very restrictive way, limiting the scope of legal reasoning (*qiyās*) and condemning *istiḥsān*. These references are by no means a mere rhetorical trick, they point to a seriously debated issue already addressed in a work with which al-Ǧāḥiẓ was familiar. In al-Šāfiʿī's *Risāla*, in the midst of a discussion concerning the interpretation of law made by those who give priority to reason over revelation (*ahl al-ʿuqūl*), the concepts of *istiḥsān* and *qiyās* are discussed in very similar terms:

> *"Do you permit someone to say: 'I employ* istiḥsān*, without using* qiyās *[*astaḥsinu bi-ghayr qiyās*]?'*
>
> **Shāfiʿī:** In my view; that is not permissible -though God knows best- for anyone. It is only for the *ahl al-ʿilm* to express [legal] opinions, and not for others [*innamā kān li-ahl al-ʿilm an yaqūlū dūn ghayrihim*], so that they express [legal] opinions that are related to a revealed text, by adhering to it, in situations for which there is no [directly opposite] revealed text, by analogizing from the revealed text [*li-an yaqūlū fī al-khabar bi-ʾttibāʿihi fīmā laysa fīhī al-khabar] biʾl-qiyās ʿalā al-khabar*].
> If it were permissible to invalidate *qiyās*, then it would be permissible for the *ahl al-ʿuqūl*, who are other than the *ahl al-ʿilm*, to express opinions concerning matters for which there is no revealed text [*khabar*], according to whatever mere preferences [*istiḥsān*] they happen to have at hand"[48].

33 The interlocutors of al-Šāfiʿī in this passage, the denominated *ahl al-ʿuqūl*, can hardly be related to the Ḥašwiyya fustigated in the *Risāla fī al-Qiyān*. But it would be an error also to consider that Muʿtazilites such as al-Ǧāḥiẓ would fall into this category without further consideration. The principle enunciated by al-Šāfiʿī in this passage limits the possibilities of expressing legal opinions to the revealed texts, exactly in the same terms as the enunciation made by the defenders of singing-girls in his epistle.

34 Al-Šāfi'ī also refutes *istiḥsān* in another work entitled *Ibṭāl al-Istiḥsān*. In this treatise he develops an unusual treatment of legal ignorance based on an extremely literalist interpretation of the sources of law.[49] When dealing with the obligations of the judge, the limits of legal interpretation are defined in similar terms:

> "[There is] the Book, then the *sunna*, or that upon which the jurists (*ahl al-ʿilm*) do not disagree, or legal reasoning based on any of these [sources] (*qiyās ʿalá baʿḍ*). It is not permitted for anyone to judge or pronounce a *fatwá* on the basis of *istiḥsān* when *istiḥsān* is not obligatory (*wājib*) and not in any of these cases (*maʿānī*) [i.e. Qurʾān, *sunna*, *ijmāʿ*, and *qiyās*].
> If someone asks: What is the proof that it is not permitted to apply *istiḥsān* when it is not included in any of these cases, as you have mentioned in this book of yours? You should reply: God Almighty said 'Does man think that he is to be left directionless?' (Q.75:36). The *ahl al-ʿilm* do not disagree upon the Qurʾān concerning that which you already know, that 'lack of direction' (*sudá*) is that which is neither commanded nor forbidden (*lā yuʾmar wa-lā yunhá*), and he who pronounces a *fatwá* or judges on the basis of that which has not been commanded has allowed himself [to do it] within the definition of 'the lack of direction' (*sudá*), and God has made him know that he is not to be left directionless".[50]

35 This descriptions answer to al-Šāfiʿī's well known definition of *bayān*: the religious sources and the consensus of the *ahl al-ʿilm* provide enough guidance to apply legal reasoning in those cases not specifically addressed by the revelation. God does not leave people directionless, as He always provides *dalāʾil* that may be interpreted, but *istiḥsān* is not a valid hermeneutical technique. The most significant aspect of this treatise is precisely the treatment of the limitations of legal reasoning, which are discussed by al-Šāfiʿī as a consequence of the ignorance of law:

> "It is incumbent upon the judges only to accept but the justice concerning that which is evident (*ʿadlan fī al-ẓāhir*); the characteristics of justice among them are known and I have described them in another place. There may be justice in that which is evident (*fī al-ẓāhir*) and that which it conceals (*fī sarīri-hi*) be not just, but God has not imposed a moral obligation [upon his subjects] (*lam yukallif-hum*) concerning those things for whose knowledge he has not provided a means of attaining (*sabīl ilá ʿilmi-hi*), and he has only imposed on them, whenever possible, but to reject those who openly act (*man ẓahara min-hu*) against that which they consider justice".[51]

36 In his *Risāla*, a similar statement is made concerning the evaluation of witnesses:

> "We are legally responsible for accepting the fitness of a man [who testifies] on the basis of how he appears to us [*mā ẓahara lanā minhu*]. We marry him off or make him an heir according to how his religion looks on the surface [*mā yaẓhar lanā min islāmihi*]".[52]

37 However, the examples that illustrate the theoretical formulations of the *Ibṭāl al-istiḥsān* seem to be based in an almost literal interpretation of the sources, and the prohibitions they discuss limited to that with is explicitly forbidden in the revealed texts.[53]

38 As we have seen, the refutation of *istiḥsān* in the *Risāla fī al-qiyān* is very similar to that of al-Šāfiʿī, but the concomitances between both works do not stop here; the way al-Ǧāḥiẓ addresses the problem of evaluating evident acts (*ẓāhir al-umūr*) is analogous to al-Šāfiʿī's treatment and employs a very similar formulation. The *muqayyinūn* report that some people condemn the houses of singing-girls adducing that those who frequent these places do not do so with the purpose of listening to their music or purchasing them, but with the intention of having sexual intercourse with the slaves. The answer given to this accusation is based, precisely, on the limitation of the legal judgements to those acts that are public and evident:

> "Judgements are only applied to the evident acts (*ẓāhir al-umūr*) and God has not imposed upon his subjects the moral obligation (*lam yukallif*) of judging according to the hidden (*bāṭin*), nor of taking action concerning their intentions (*al-ʿamal ʿalā al-niyyāt*). Thus, a man is considered Muslim (*yuqḍā li-l-raǧul bi-islām*) on the basis of how he appears (*bi-mā yaẓhuru minhu*). He may inwardly be a heretic, or considered the legitimate son of his father when, perhaps, the father whose paternity he claims did nor sire him; however, since he was born in his bed and it is known, his origin is traced back to him. If it were a duty (*kullifa*) upon the one who testifies for a man in any of these two cases to tell the truth, there could not be testimony on this matter. Those who attend our assemblies do not evidence anything of that which is attributed to them, and if they did it and we turned a blind eye to it, then we would not incur any sin".[54]

39 The textual complexity of this epistle and the lack of information about the circumstances of its composition do not allow us but to speculate about the significance of these references. Although the textual evidence is not conclusive, the parallelism between these passages and al-Šāfiʿī's considerations seems clear and, due to al-Ǧāḥiẓ's familiarity with al-Šāfiʿī's *Risāla*, we would not be on the wrong path if we were to consider that he was making explicit reference to his thesis on *istiḥsān*. Nevertheless, the intention behind the particular use of this legal argumentation in the *Risāla fī al-qiyān* is quite different. In fact, al-Ǧāḥiẓ and al-Šāfiʿī part ways the very moment these theoretical disquisitions are put into practice: al-Šāfiʿī is interested in the practical consequences of the ignorance of law; but the consequences that al-Ǧāḥiẓ discusses in his epistle are those which result from the ignorance of the acts themselves and the fact that no judgement can be based on intention.

40 It would be possible, as Cheikh-Moussa argues, that the use of solid legal arguments to build the defence of the singing-girls, and the engagement in real polemics debated at the ʿAbbāsid court in the time of al-Ǧāḥiẓ were a narrative device used to emphasise the absurdity of this position. However, the fundaments of the reasoning are completely coherent with the overall argumentative line, and, as I will try to argue, the justification of sexual intercourse with slaves was by no means absurd in this context. If these arguments can be considered satirical is precisely because they can be read literally.

The spirit of the law *vs*. the letter of the law

41 The emphasis on the limits of the practices rendered *ḥarām*, the restrictive –almost literalist– treatment of the revealed sources, and the refutation of *istiḥsān* point to a debate focused on theoretical legal problems. However, the insistence on judging uniquely the evident indicia (*ẓāhir al-umūr*), the reference to the testimony of the witness and the formulation of many of the anecdotes seem to point in the opposite direction, to the realm of praxis. This apparent contradiction is solved in the last stage of the *risāla*, when we hear the allegations of the owners of the slave girls whose names, real or not, are given by al-Ǧāḥiẓ.

42 The *muqayyinūn* do not only defend the nobility of their occupation, but also its licitness. The basis for this point is that the alleged sexual relations with the slaves, when they exist, can only be interpreted as the licit consequence of a perfectly legal contractual procedure. Concretely, they claim that those who can differentiate between permitted and prohibited (*farq mā bayna al-ḥalāl wa-l-ḥarām*) would not find anything illegal in proxenetism (*kašḥ*).[55] Selling a slave and buying her again for a lower price, once the passion of her buyer has dissipated and he wants to send her back to her former owner, is perfectly licit; and if the intention of the clients who visit their girls is to arrange a temporary marriage

(*yakūnu qaṣduhu li-l-mutʿa*), they ask, what discredited should be attached to them?[56] Indeed, they are applying the principles exposed at the beginning of the epistle: enjoying the company and musical skills has not been rendered *ḥarām* by God, therefore it is completely lawful; as for their trade, their transactions are perfectly legal, as the *aḥkām* can only be based on evidences, not on the hidden intentions of their clients.

43 This last affirmation, sustained on the repeated arguments concerning the limits of legal interpretation, is the perfect corollary to this fascinating *tour de force* in defence of the singing girls, and discloses the underlying logic of the epistle: it is the letter of the law which counts, not its spirit. It also points to the legal polemic to which this treatise of al-Ǧāḥiẓ ultimately answers: the debate concerning the *maḫāriǧ fī al-fiqh* or *ḥiyal fī al-fiqh*, the legal tricks or devices used to achieve an objective, sometimes illegal, through apparently legal means. It is within the broad framework of reference of *fiqh* and the particular context of the polemics concerning *ḥiyal* where the *Risāla fī al-qiyān* reveals all its rich complexity.

44 Several treatises that bear testimony to the vividness of the discussion of *ḥiyal* in the early ʿAbbasid period have survived. It was Joseph Schacht who made the greatest contribution to the study of this subject with the edition of four treatises on *ḥiyal*, three Ḥanafī and one Šāfiʿī. Two of the Ḥanafī treatises were written in the third/ninth century: the *Kitāb al-maḫāriǧ fī al-ḥiyal* by Muḥammad b. al-Ḥasan al-Šaybānī (d. 189/805), and the *Kitāb al-ḥiyal wa-l-maḫāriǧ* by Aḥmad b. ʿUmar al-Ḫaṣṣāf (d. 261/874); the third one is a commentary of al-Šaybānī's work by Muḥammad b. Aḥmad al-Saraḫsī (d. 448/1056), included in his *Kitāb al-mabsūṭ*. The fourth one, entitled *Kitāb al-ḥiyal fī al-fiqh*, was written by the Šāfiʿite jurist Maḥmūd b. al-Ḥasan al-Qazwīnī (fl. 440/1048), although we know that at least two other Šāfiʿite treatises on *ḥiyal* were written prior to the fourth/tenth century[57].

45 For Schacht, the discussions on these legal devices aimed to fill the gap between legal theory and social praxis[58]. The pious jurists of the first/seventh century formulated the legal rules in such a rigid manner that it prevented the development of varied commercial activities. Like Roman commercial law, which complemented the formal and rigid *ius civile*, *ḥiyal* would provide a valid way to overcome these limitations.[59]

46 Schacht's thesis have been revised in the last years, notably by Satoe Horii, who has criticised the sharp distinction he posited between theory and practice and emphasised the role that the *ḥiyal* played in the theoretical discussions of jurists attached to different schools, not only Ḥanafīs. Precisely, one of the arguments upon which Horii draws attention to signal the importance of taking seriously the juristic understanding of *ḥiyal* is that, according to the remarks made by al-Ḫaṣṣāf in the introductory chapter of his *Maḫāriǧ*, "a legal act must be judged according to its appearance, irrespective of the real intentions behind it".[60]

47 Although al-Ḫaṣṣāf does not use the expressions *ẓāhir* or *bāṭin*, his definition of *ḥila* is based in the opposition of dealings (*muʿāmalāt*) and suspicion (*šubha*, *wahm*):

> "There is nothing wrong in the legal devices (*ḥiyal*) concerning that which is licit (*fīmā yaḥallu*) and admitted (*yaǧūzu*). The legal devices (*ḥiyal*) are something with which a man escapes from sins (*al-ma'āṯim*) and prohibition (*al-ḥarām*) and finds an exit (*yaḫruǧu*) with it towards that which is licit (*ḥalāl*). In this and similar things there is nothing wrong. The only thing blameful in this is when a man uses a legal device (*yaḥtālu*) against the rights of another man in order to prove him to be wrong (*yabṭuluhu*), or when he uses a legal device on something wrong until it becomes doubtful (*ḥattā yuwahima*) or applies it to something to create doubts about it (*šubha*). As for that which corresponds to the method that we have described, there is nothing wrong, and this is a book in which there are things that people need regarding their dealings (*muʿāmalātihim*) and issues (*umūr*)".[61]

48 Al-Ḫaṣṣāf also states clearly that legal judgement cannot be based on intentions: "the intention (*niyya*) of someone does not change any of the legal decisions stipulated by God (*ḥukm min aḥkām Allāh*), nor does it remove him from his position".[62]

49 It is beyond doubt that the arguments conveyed by al-Ǧāḥiẓ address similar legal problems, but two questions remain open: first, can we find any direct relation between the singing girls and the treatises on *ḥiyal*? Second, were the members of the ʿAbbāsid court mentioned in the introduction and the Ḥašwiyya related to these particular polemics?

50 The answer to the first question is, to a great extent, provided by al-Ǧāḥiẓ himself. As we have seen, the way of acquiring a slave described by the *muqayyinūn* is a legal device that conceals a temporary marriage. The anecdote where Umm Ǧaʿfar, al-Ma'mūn's wife, manumits her slave so that his husband could marry her and divorce her once he has sated his passion is also one of these *ḥiyal*. Even the anecdotes about free women reproduce the typical casuistry of this literature: someone wants to marry a woman whose former husband has divorced under certain condition (*šarṭ*), and a legal device is applied to solve this problem. The episode concerning ʿUmar b. al-Ḫaṭṭāb is one of these cases. ʿUmar married ʿĀtika bint Zayd b. Nufayl after she became a widow and had received part of her former husband's possessions on the condition of never remarrying. ʿUmar found a way to break this promise by stipulating that he should give her an equivalent sum of money, and that she should distribute it in alms.[63] Though apparently less contrary to the spirit of the law than the former example, the objective of this measure was none other than breaking a promise, one of the main subjects of the treatises on *ḥiyal*.

51 If we pay attention to the taxonomy of the cases contemplated in these treatises, marriages with free women and slaves hold a privileged position. In the introduction of the commentary of al-Šaybānī's *Kitāb al-maḫāriǧ fī al-ḥiyal* made by al-Saraḫsī, these are precisely the main causes adduced in order to prove the need of *ḥiyal*:

> "He who scrutinises the legal judgements (*aḥkām al-šarʿ*) finds that all kind of acts answer to the description [of *ḥīla*]: if someone loves (*aḥabba*) a woman, when he asks: 'what is the legal device (*ḥīla*) for me to achieve her?', the answer is: 'marry her'; if he is infatuated with a slave (*hawā ǧāriya*) and asks: 'what is the legal device (*ḥīla*) for me to achieve her?', the answer is: 'buy her'; when he does not like the company of his wife and asks: 'what is the legal device (*ḥīla*) for me to separate from her?', the answer is: 'divorce her', and if, after divorcing her, he regrets [his decision] and asks about the legal device (*ḥīla*) to solve this, the answer is: 're-marry her (*rāǧǧaʿahā*)'; and after divorcing her three times, if she repents from her bad conduct and they both ask about a legal device (*ḥīla*) for them, the answer is that the legal device (*ḥīla*) consists in marrying her with another husband who should have sexual intercourse with her.
>
> Those who abhor the use of *ḥiyal* in legal decisions, in reality, abhor legal decisions themselves, and only those who have little attention fall in this confusion".[64]

52 If we were to evaluate this passage by applying the same criterion used to read al-Ǧāḥiẓ's epistles we should conclude that this is a fine example of irony, but it is not: the Muslims jurists on the third/ninth century took this issue very seriously. Al-Saraḫsī's commentary begins with a defence of *ḥiyal* from the attacks of those who, in his opinion, are ignorant (*ǧuhhāl*), miserable (*mukāšafa*) and incapable of doing a proper analysis of the sources of law (*qillat al-taʾammul*).[65] This commentary was written in the first half of the six/eleventh century, but, as we have seen in the case of al-Ḫaṣṣāf, the treatises that have survived from the fourth/ninth century also adopt a defensive tone. Since we cannot consider that the defence of *ḥiyal* was exclusively Ḥanafī, we cannot ascribe its critics to one specific school or orientation. However, both the especial involvement of the early Ḥanafī school in the development of *ḥiyal* and the anti-Traditionist theological positions of Abū Ḥanīfa and his followers are well known.[66] The ascendancy of illustrious scholars related to the Baṣran or early Ḥānafī schools over the caliphal court is also well attested; we only need to think of Abū Yūsuf — represented in the *Alf laylā wa-laylā* as a master of *ḥiyal*![67] —, Yaḥyā b. Akṯam, or the patron of al-Ǧāḥiẓ and Ibn Ḥanbal's archenemy, Ibn Abī Duʾād.

53 It is also possible to find evidence of a clearly belligerent position against *ḥiyal* in the Traditionist milieu where those whom al-Ǧāḥiẓ pejoratively denominated Ḥašwiyya belonged. No less a scholar than al-Buḫārī included a chapter condemning *ḥiyal* in his collection of *ḥadīṯ,* which begins with a prophetic *ḥadīṯ* stating that God rewards people according to their intentions (*aʿmāl bi-l-niyya*)[68], and includes an explicit condemnation of the *ḥiyal* used to arrange a temporary marriage. Al-Buḫārī, on the authority of ʿAlī, reports that the Prophet forbad the practice of *mutʿa* on the day of the Battle of Ḫaybar: some people consider that the legal devices applied to arrange a temporary marriage (*iḥtiyāl ḥattā tamattaʿa*) render the marriage invalid (*al-nikāḥ fāsid*), others argue that the marriage is valid (*ǧāʾiz*), but its condition is invalid (*al-šart bāṭil*)[69]. The same reasoning is repeated in the commentary of a *ḥadīṯ* condemning a legal device used to avoid paying the dowry denominated *šiġār*[70].

54 The quarrel between the members of the court presented as the alleged authors of the *Risāla fī al-Qiyān*, the *muqayyinn*, and their intellectual interlocutors, the Ḥašwiyya, echoes this polemic and applies the same legal arguments to the defence of the singing girls and the pleasures of their *maǧālis*. As we have shown, the legal basis for this defence is by no means a sophistic inversion of the *šarīʿa*, but a reasoned and coherent reflection upon the hermeneutical techniques that allow legal interpretation and its limits.

Conclusions

55 The aim of this article was to emphasise the importance of legal disquisitions for the proper understanding of the *Risāla fī al-qiyān*. In the light of these conclusions, however, we need to ask an obvious question: how can we harmonise this reading with the solid ethical considerations discussed in the epistle? The metanarrative twist of the last paragraph offering three authorial ascriptions —which Pellat did not considered part of the work—, suggests that this *risāla* may have been conceived as an intellectual game. The moral distance between the proper —and ethical— interpretation of law and the legal —yet unethical— devices used to render it practicable may have been for al-Ǧāḥiẓ proportional to that which separated *ḥubb* and *ʿišq*. I would like to propose, however, an alternative reading: would it be possible to understand this discourse on love as a subversion of the moral principles on which it relies, in the same way that legal principles were manipulated to defend the singing-girls?

56 If, rather than as a critique of the singing-girls, we read the censure of infatuation as part of a discussion between the noble men, who want to enjoy the pleasures provided by the slave-girls, and the *muqayyinūn*, who are interested in prolonging this passionate state, this argumentation acquires a different meaning which may be compatible with the discourse on law.

57 The dangers of the singing-girls denounced by al-Ǧāḥiẓ, who speaks in first person in these passages, are based on the passion they inspire and its consequences for the physical and mental health of the infatuated client. Unlike the pure sentiments inspired by love, passion disappears as soon as the object of desire is attained. If there is nothing illegal in this practice, then the only obstacle between those who want to enjoy the company of the singing-girls and the object of their passion is the dilatory practices of the *muqayyinūn* who seek to increase their benefits and know that, when the lover possesses the beloved, passion ends and their profits diminish[71]. From this perspective, al-Ǧāḥiẓ's discourse on love could have also been aimed at supporting the arguments of the authors of the epistle: enjoying the company of singing-girls is a licit and acceptable practice whose only danger lies in the greed of their owners, always eager to play with the feelings of the clients infatuated with their slaves; but if passion could be easily sated by attaining the object of desire through lawful means, then decorum and *muruʾa* would remain intact. Thus, both the discourse on law and the discourse on love could have been used to build the arguments of the authors of the epistle: the first is addressed to the Ḥāšwiyya, the second to the *muqayyinūn*.

58 This subversion of the ethical principles of law and love can only be understood as irony. As in other treatises of al-Ǧāḥiẓ, the humoristic effect of this text depends to a great extent on the ignorance of those who are incapable of understanding the subtleties of his reasoning. The narrative device that explains the satirical nature of this masterpiece is not the humoristic face value of the opinions of its purported authors, but the use of solid and coherent arguments in defence of immoral practices.

59 Of course, many of my affirmations are entirely conjectural, but this interpretation offers a possible reading. We are not familiar with the conventions governing this epistle and there is still much research needed to decipher the codes of ʽAbbāsid etiquette and how they are related to the social logic of texts. The *Risāla fī al-qiyān* is a paradigmatic example of the problems we researchers have to face. This text challenges, especially, the generic divisions that affect the study of *adab*, but also those which affect the study of Islamic law. In this paper I have tried to demonstrate that *fiqh*n'est pas seulement un autre élément du cabinet de curiosités d'al-āḥiẓ. Son lien intellectuel avec des personnalités telles que al-Šāfiʿī peut éclairer de nombreux aspects de son travail. Inversement, l'utilisation par Al-āḥiẓ de principes herméneutiques sophistiqués témoigne de la mesure dans laquelle la théorie juridique avait imprégné la société bAbbāsid à partir du troisième / neuvième siècle. À cet égard, il ne serait pas exagéré d'affirmer que les historiens de la littérature devraient garder à l'esprit les polémiques juridiques lors de la lecture d'al-Ǧāḥiẓ, et qu'al-Ǧāḥiẓ est l'un de ces auteurs que les historiens du droit islamique devraient lire.

Bibliographie

Sources arabes

Bāqillānī (al-) , *Iʿǧāz al-Qurʾān* : ed. Aḥmad Saqir , Le Caire, Dār al-Maʿārif, 1977.

Buḫārī (al-), *Ṣaḥīḥ*: ed. Rifāʿī, Beirut, 1987.

Ǧāḥiẓ (al-), *Kitāb al-ʿAbbāsiyya*: ed. SANDŪBĪ in *Rasāʾil al-Ǧāḥiẓ*, Cairo, Al-Maṭbaʿa al-Tigāriyya al-Kubrā, 1932, p. 300-303.

Ǧāḥiẓ (al-), *Kitāb Taṣwīb ʿAlī fī al-Ḥakamayn*: ed. Charles Pellat, *al-Mašriq* 52, 1958, p. 417-491.

Ǧāḥiẓ (al-), *Risāla fī Ḥugʿagʿ al-Nubuwwa*: ed. ʿAbd al-Salām Muḥammad HĀrŪn, in *Rasāʾil al-Ǧāḥiẓ*, Cairo, Maktabat al-Ḫangī, 1965, III p. 223-281.

Ǧāḥiẓ (al-), *Risāla fī al-Qiyān*: ed. ʿAbd al-Salām Muḥammad HĀrŪn, in *Rasāʾil al-Ǧāḥiẓ*, Cairo, Maktabat al-Ḫangī, 1965, II, 143-182.

Ǧāḥiẓ (al-), *Kitāb al-ʿUṯmāniyya*: ed. ʿAbd al-Salām Muḥammad HĀrŪn, Cairo, Dār al-Kitāb al-ʿArabī, 1955.

Ǧāḥiẓ (al-), *The Epistle on Singing-Girls by Jāḥiẓ*: ed. A.F.L. Beeston, Warminster, Aris and Phillips, 1980.

Ǧāḥiẓ (al-), *Kitāb al-Āṯār wa-Kayfa Taṣiḥḥu*, ed. Joseph Van Ess as: "Ein unbekanntes Fragment des Nazzam", in *Der Orient in der Forschung. Festschrift für Otto Spies*, Wiesbaden, Harrassowitz, 1967, p. 170-201.

Ḫaṣṣāf (al-), *Kitāb al-Ḫaṣṣāf fī al-Maḫārig*: Cairo, n.p., 1986.

Ḫaṭīb al-Baġdādī (al-): *Taʾrīkh Baġdād aw Madīnat al-Salām*, Cairo, Maktabat al-Ḫangī, 1931.

Ibn Khālikān, *Wafayāt al-Aʿyān*: ed. Muḥammad ʿAbd Al-Ḥamīd, Cairo, Maktabat al-Nahḍa al-Miṣriyya, 1948-1950.

Ibn Qutayba, *Kitāb Muḫtalif al-Ḥadīṯ*, Cairo, Maṭbaʿāt Kurdistān al-ʿIlmiyya, 1908.

Ibn Taghrī Birdī, *Al-Nujūm al-Zāhira*: Cairo, Maṭbaʿat Dar al-Kutub al-Miṣriyya, 1930.

ŠāfiʿĪ (al-), *Risāla* ed. Šākir, A.M., Cairo, Al-Ḥalabī, 1940.

ŠāfiʿĪ (al-), *Ibṭāl al-Istiḥsān*, in ŠāfiʿĪ (al-), *Kitāb al-Umm*: ed. A.F. ʿAbd Al-Muṭallib, Al-Manṣūra, Dār al-Wafāʾ li-l-Ṭibāʿa wa-l-Našr wa-l-Tawfīʿ, 2001.

Saraḫsī (al-), *Kitāb al-Mabsūṭ* (commentary of al-Šaybānī's *Kitāb al-Maḫārig*), in al-Šaybānī, s.d.: *Kitāb al-Maḫārig fī al-Ḥiyal*: ed. Schacht, Joseph, Baghdad, Al-Muthanna (reprint of Leipzig, 1930), p. 77-98.

Šaybānī (al-), *Kitāb al-Maḫārig fī al-Ḥiyal*, ed. Schacht, Joseph, Baghdad, Al-Muthanna (reprint of Leipzig, 1930).

Subkī (al-), *Tabaqāt al-Shāfiʿiyya al-Kubrā*: ed. M.M. al-Tunahī, and A.M. al-Ḥilū, Cairo, Dār Iḥyā al-Kutub al-ʿArabiyya, 1964.

Secondary Literature

Cheikh-Moussa, Abdallah, 1990: "La négation d'Éros ou le ʿišq d'après deux épîtres d-al-Ǧāḥiẓ", *Studia Islamica* 72, p. 71-119.

Cook, Michael, 2000: *Commanding Right and Forbidding Wrong*, Cambridge, Cambridge University Press.

Cooperson, Michael, 2009: "Al-Jāḥiẓ, the Misers, and the Proto-Sunnī Ascetics", in Heinemann, Arnim *et al.* (eds.): *Al-Jāḥiẓ: A Muslim Humanist for Our Time*, Würzburg, Ergon Verlag in Kommission, p. 197-219.

Crone, Patricia and Hinds, Martin, 1986: *God's Caliph*, Cambridge, Cambridge University Press.

Gordon, Matthew, "Yearning and Disquiet: al-Jāḥiẓ and the *Risālat al-Qiyān*", in Heinemann, Arnim *et al.* (eds.): *Al-Jāḥiẓ: A Muslim Humanist for Our Time*, Würzburg, Ergon Verlag in Kommission, p. 253-268.

Horii, Satoe, 2002: "Reconsideration of Legal Devices (*Ḥijal*) in Islamic Jurisprudence: The Ḥanafīs and their Exits (*Makhārij*)", *Islamic Law and Society*, 9/3, p. 312-357.

Lapidus, Ira, 1975: "The Separation of State and Religion in the Development of Early Islamic Society", *International Journal of Middle Eastern Studies,* 6, p. 363-385.

Lowry, Joseph, 2007: *Early Islamic Legal Theory. The* Risāla *of Muḥammad ibn Idrīs al-Shāfiʿī*, Leiden, Brill.

Melchert, Christopher, 1997: *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E.*, Leiden, Brill.

Montgomery, James E., 2005: "Jāḥiẓ's *Kitāb al-Bayān wa-l-Tabyīn*" in Bray, Julia (ed.), *Writing and Representation in Medieval Islam. Muslim Horizons*, London, Routledge, p. 91-152.

Montgomery, James E., 2006: "Beeston and the Singing-Girls", in Carter, Rob and Simpson, John (eds.): *Proceedings of the Seminar for Arabian Studies (2006)*, Oxford, Archaeopress, p. 16-24.

Pellat, Charles, 1961: "L'Imamat dans la doctrine de Ǧāḥiẓ", *Studia Islamica* 15, p. 23-52.

Pellat, Charles, 1963: "Les esclaves chantauses de Ǧaḥiẓ", *Arabica* 10, 2, p. 121-147.

Pellat, Charles, 1969: *The Life and Works of al-Jāḥiẓ,* London, Routledge & Kegan Paul.

Pellat, Charles, 1984: "Nouvel essai d'inventaire de l'œuvre Ǧāḥizienne", *Arabica* 31/2, p. 117-169.

Sanchez, Ignacio, "Shāfiʿite Hermeneutics and Qurʾānic Interpretation in al-Jāḥiẓ's *Kitāb al-ʿUthmāniyya*", in Görke, Andreas and Pink, Johana (eds.): *Tafsīr: The Evolution of a Genre in the Framework of Islamic Intellectual History* (forthcoming).

Schacht, Josef, 1926: "Die arabische *ḥiyal*-Literatur. Ein Beitrag zur Erforschung der islämischen Rechtspraxis", *Der Islam* 15, p. 211-232.

Schacht, Josef, 1952: "Notes sur la sociologie du droit musulmane", *Revue Africaine* 96, p. 327.

Sicard, Frédérique, 1987, "L'amour dans la *Risālat al-Qiyān*: Essai sur les esclaves chanteuses de Gāḥiẓ", *Arabica* 34/3, p. 326-338.

Stewart, Devin, 2002: "Muḥammad b. Dāʾūd al-Ẓāhirī's Manual of Jurisprudence", in WEISS, Bernard (ed.): *Studies in Islamic Legal Theory*, Salt Lake City, University of Utah Press, p. 99-158.

Yücesoy, Hayrettin, 2009: *Messianic Beliefs and Imperial Policies in Medieval Islam*, Columbia, University of South Carolina Press.

Zaman, Qasim, 1997: *Religion and Politics under the ʿAbbāsids*, Leiden, Brill.

Notes

1 I wish to thank James Montgomery and the anonymous reviewer for their valuable and insightful comments on this article.

2 Montgomery 2007.

3 See Sicard 1987, Cheikh-Moussa 1990 and Gordon 2009.

4 Ibn Qutayba, *Muḫtalif al-ḥadīṯ,* p. 59-60.

5 On al-Ǧāḥiẓ's life and career see Pellat 1953.

6 Pellat 1984, *sub* n. 75. Bāqillānī, *Iʿjāz al-Qurʾān*, p. 377.

7 Edited in Van Ess 1976.

8 Montgomery 2005.

9 Lowry 2007, p. 51-55.

10 Al-Gˇāḥiẓ refers to al-Šāfiʿī as the author of the *Risāla fī iṯbāt ḫabar al-wāḥid*, see al-Gˇāḥiẓ, *Risāla fī faḍl Hāšim ʿalá ʿAbd al-Šamš*, p. 106.

11 Al-Gˇāḥiẓ makes a consistent use of Šāfiʿite hermeneutics especially in the *Kitāb al-ʿuṯmāniyya*. I have analysed al-Gˇāḥiẓ's treatment of the Qurʾān in this treatise, see Sánchez (*forthcoming*).

12 Cheikh-Moussa 1990, p. 101.

13 Cheikh-Moussa 1990, p. 89-95.

14 A good example of this consideration is Pellat's taxonomy in his collection of translations from al-Gˇāḥiẓ's treatises, see Pellat 1984.

15 Cheikh-Moussa 1990, p. 103.

16 al-Gˇāḥiẓ, *Risāla fī al-Qiyān*, 16 § [hereafter *qiyān*, the references are to the paragraphs of Beeston's edition. Although I have closely followed Pellat and Beeston's translations, the passages translated in this article are my own].

17 *Qiyān*, § 7. I have followed Beeston's translation.

18 *Qiyān*, § 7.

19 *Qiyān*, § 8.

20 *Qiyān*, § 9 [147;12f].

21 *Qiyān*, § 10-11.

22 *Qiyān*, § 11.

23 *Qiyān*, § 14. As Cheikh-Moussa has noted, the story is rather different in other sources, where ʿUmar asks his wife to wear a veil, see Cheikh-Moussa 1990, p. 110.

24 *Qiyān*, § 25.

25 *Qiyān*, § 25.

26 *Qiyān*, § 27.

27 The change occurs in *Qiyān*, §28.

28 *Qiyān*, § 19.

29 *Qiyān*, § 20-23.

30 *Qiyān*, § 23.

31 *Qiyān*, § 31.

32 *Qiyān*, § 28.

33 Cheikh-Moussa 1990, p. 108-110.

34 Ibn Qutayba, *al-Iḫtilāf fī al-lafẓ*, p. 35-36.

35 On al-Gˇāḥiẓ's critique of religious scrupulosity, see Cooperson 2009.

36 Cook 2000, p. 90-91.

37 See Cook 2000, especially the section on the Ḥanbalites of Baghdad, p. 87-105.

38 *Qiyān*, § 24.

39 *Qiyān*, § 50.

40 *Qiyān*, § 59.

41 al-Khaṭīb al-Baġdādī, *Ta'rīkh Baghdād,* XIV, p. 201; al-Subkī, *Tabaqāt al-Shāfiʿiyya al-Kubrā*, II, p. 57. According to these sources, al-Ma'mūn finally recognised that *mutʿa* should be prohibited after the Ḥanafī Yaḥyā b. Akṯam proved the soundness of a prophetic *ḥadīṯ* forbidding it. Ibn Taghrī Birdī, *al-Nugˇūm al-Ẓāhira*, II, p. 292; and Ibn Khāllikān, *Wafayāt al-aʿyān*, V, 200.

42 al-Gˇāḥiẓ, *Kitāb al-ʿabbāsiyya.*

43 For a recent analysis of al-Maʾmūn's vindication of his religious authority *vis-à-vis* Abū Bakr and ʿUmar which also refers to al-Maʾmūn's messianic beliefs, see Yücesoy 2009, p. 130 f.

44 Cheikh-Moussa 1990, p. 88-95.

45 Lapidus1975, Crone and Hinds 1986

46 Zaman 1997.

47 *Qiyān*, § 59.

48 al-Šāfiʿī, *Risāla,* §1456-1458. I am quoting the translation of Lowry 2007, p. 290; the terms between brackets are his.

49 On this treatise see Lowry, "Ignorance of the Law is Sometimes an Excuse: al-Shāfiʿī's *Ibṭāl al-Istiḥsān* and the Construction of Juristic Authority" unpublished paper presented in the *5th Meeting of the School of Abbasid Studies*.

50 al-Šāfiʿī, *Ibṭāl al-Istiḥsān*, p. 68.

51 al-Šāfiʿī, *Ibṭāl al-Istiḥsān*, p. 72.

52 al-Šāfiʿī, *Risāla*, 1350 §; I have quoted Lowry's translation cf. Lowry 2007, p. 148.

53 Joseph Lowry has suggested that this could be a concession to the thesis of the Ẓāhirīs, who, of course, also refuted *istiḥsān*. We know that the son of the founder of the school, Muḥammad Ibn Abī Da ʾūd included a refutation of *istiḥsān* in his manual of jurisprudence, some of whose fragments have survived in quotations transmitted by al-Qāḍī al-Nuʿmān, (see Stewart 2002).

54 *Qiyān*, §37.

55 *Qiyān*, § 59.

56 *Qiyān*, § 59.

57 See Schacht 1926 and Horii 2002.

58 Schacht 1926, p. 211.

59 Schacht 1952, p. 327.

60 Horii 2002, p. 316.

61 al-Ḫaṣṣāf, *Kitāb al-ḫaṣṣāf fī al-maḫārigˇ*, p. 4. The last sentences concerning the wrong practices that should be censured are repeated literally in al-Saraḫsī's commentary of al-Šaybānī, p. 88-89.

62 al-Ḫaṣṣāf, *Kitāb al-ḫaṣṣāf fī al-maḫārigˇ*, p. 7.

63 *Qiyān*, § 14.

64 al-Saraḫšī, *Kitāb al-Mabsūṭ* (reproduced in al-Šaybānī, *Kitāb al-maḫārigˇ fī al-ḥiyal*), p. 77.

65 al-Saraḫšī, *Kitāb al-Mabsūṭ*, p. 77.

66 Melchert 1997, p. 32-38.

67 Melchert 1997, p. 9.

68 al-Buḫārī, *Ṣaḥīḥ*, n.°6553.

69 al-Buḫārī, *Ṣaḥīḥ*, n. 6560.

70 al-Buḫārī, *Ṣaḥīḥ*, n. 6559.

71 *Qiyān,* § 57.

References

Bibliographical reference
Ignacio Sánchez, « Reading *Adab* as *Fiqh*: al-Ǧaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*) », *Bulletin d'études orientales*, Tome LX | 2012, 203-221.

Electronic reference
Ignacio Sánchez, « Reading *Adab* as *Fiqh*: al-Ǧaḥiẓ's Singing-Girls and the Limits of Legal Reasoning (*Qiyās*) », *Bulletin d'études orientales* [Online], Tome LX | mai 2012, Online since 31 May 2012, connection on 12 March 2019. URL : http://journals.openedition.org/beo/520 ; DOI : 10.4000/beo.520

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